No. 87-224

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE DOW CHEMICAL COMPANY, et al.,

Petitioners,

v.

MICHAEL RYAN, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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Summary of the Argument

Respondent has made no attempt to justify the decision below on the grounds relied upon by the Court of Appeals. Instead of confronting the serious issues concerning Federal Rule of Civil Procedure 26(c) raised by the Court of Appeals and the Petition, Respondent attempts to evade those issues by arguing the facts of the case. Unable to deny that the decision below is likely to cause serious problems for the civil discovery system, Respondent merely suggests that this Court need not concern itself with these problems.[1]

[1] The need for review has been intensified by the filing of another petition for certiorari raising substantially the same Rule 26(c) issues only two months after the filing of the petition in this case. *See Liggett Group, Inc.* v. *Cippollone*, No. 87-564.

Argument

I.

Respondent Bases Its Position on a Series of Unsupported Factual Assertions That Fail to Respond to the Issues Raised by the Petition.

The Court of Appeals did not cite any authority to support its holding that any non-party has a presumptive right of access to any discovery documents in any case without any showing of need. Respondent likewise does not cite any authority to support the Court of Appeals' interpretation of Rule 26(c), and does not deny that this holding is troubling. *See* Brief for Respondent at 11. Indeed, Respondent avoids any discussion of the Court of Appeals' unprecedented interpretation of Rule 26(c) and opts, instead, to try to convince the Court that the Petition merely raises questions of fact. The factual matters raised in Respondent's brief are not relevant to the issues raised in the Petition.

Respondent makes three unsupported factual assertions in response to Petitioners' argument that the decision below misinterpreted Rule 26(c). Respondent claims: first, that it is not a non-party; second, that the problems created by the decision below might not be as bad as Petitioners suggest; and third, that regardless of how Rule 26(c) is interpreted, Respondent should be entitled to the documents. Brief for Respondent at 11.

The VVA's status as a non-party amicus in the *Agent Orange* proceedings was decided when its motion to intervene was denied.[2] The VVA did not dispute its role as a

[2] The VVA moved to intervene on April 25, 1984. The motion was denied during oral argument on May 4, 1984.

non-party amicus below, and certainly cannot do so now before this Court. In any event, when the Court of Appeals created a public right of access, *In re "Agent Orange" Product Liability Litigation,* 821 F.2d 139, 145-46 (2d Cir. 1987), and Respondent stated below that the issue was whether "the public" has a right of access (Brief for Appellee VVA at 1), the VVA's status is not in any way relevant.

Respondent's argument that the problems created by the decision below might not be so serious is a tacit admission that the decision will create such problems. Respondent argues that this Court should not be concerned by these problems. Instead, it should wait and see how lower federal courts deal with the problems before solving them. Brief for Respondent at 11. The wiser course, however, would be to avoid such problems in the first instance.

Respondent further suggests that regardless of what rule is applied, Respondent would be entitled to the documents. If the District Court or the Court of Appeals had so held, Petitioner would clearly have no grounds to petition this Court. However, the Court of Appeals did not consider any approach to Rule 26(c) other than its unprecedented misinterpretation of that Rule. This Court's role is not to speculate about how the correct rule may be applied to these facts. *See, e.g., United States* v. *Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). We respectfully submit that this Court should correct the rule and let the district court deal with applying the law to the facts.

II.

Respondent's Attempt to Distinguish *Seattle Times* Ignores Essential Elements of the *Seattle Times* Court's Reasoning.

Respondent suggests that the direct conflict between the reasoning of the Court of Appeals in this case and the reasoning of this Court in *Seattle Times* does not present the sort of conflict this Court ought to be concerned with. Brief for Respondent at 9-10. Respondent's argument simply ignores the fact that the *Seattle Times* Court's analysis of Rule 26(c) was central to its decision and is central to the civil discovery system. To determine whether to permit public dissemination of discovery materials, the *Seattle Times* Court needed to examine the purpose of Rule 26(c) and whether public dissemination ought to be the rule or the exception. *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 33-36 (1984). The Court of Appeals and the *Seattle Times* Court are in direct conflict on these issues. This conflict, as well as the problems that are likely to result from the creation of a public right of access to any discovery documents in any case without any showing of need, are issues that urgently need resolution by this Court.

Conclusion

The writ of certiorari should be granted.

Dated: Uniondale, New York
November 5, 1987

Respectfully submitted,

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